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Right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report prepared by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, in accordance with Human Rights Council resolutions 6/29 and 24/6.

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Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Summary

In the present report, the Special Rapporteur considers a number of critical elements that affect the effective and full implementation of the right to health framework. He begins by reaffirming the justiciability of economic, social and cultural rights, including the right to health, by reiterating the indivisibility and interdependence of all human rights and stressing the timely entry into force of the Optional Protocols to the International Covenant on Economic, Social and Cultural Rights in 2013 and to the Convention on the Rights of the Child on a communications procedure in 2014. The Special Rapporteur then explores the concept of the progressive realization of the right to health and underlines the importance of the enforcement of State obligations through court judgements that recognize the State's capacity and incorporate monitoring by the court and civil society participation. He further focuses on the accountability deficit of transnational corporations and calls for an international mechanism to hold them liable for violations of human rights. The Special Rapporteur also urges a review of the current system of international investment agreements and the investor-State dispute settlement system with a view to creating a level playing field between transnational corporations and States. The Special Rapporteurs concludes his report with a set of specific recommendations on bridging the gaps in the full realization of the right of everyone to the enjoyment of the highest attainable standard of health.

I. Introduction

1. Article 12 of the International Covenant on Economic, Social and Cultural Rights is a comprehensive statement of the right to health. It has been elaborated and interpreted in general comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights. The right to health framework set out in the general comment has empowered individuals to ensure that States respect, protect and fulfil the right to health. However, some issues need to be addressed not only within the international right to health framework, but also within the right to health in domestic law.

2. In contrast to the immediate obligations of States under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights has been seen as enumerating rights that need not be fulfilled immediately. This has resulted in the view that economic, social and cultural rights can be fulfilled separately from civil and political rights, and that the former may not be justiciable. This view overlooks the fact that economic, social and cultural rights, including the right to health, are required for the full enjoyment of civil and political rights. Furthermore, the realization of the right to health is assumed to be dependent on available resources. This view is also fallacious, as States need resources to ensure the enforcement and enjoyment of civil and political rights as well. For example, States require resources for properly equipped investigative agencies and functioning courts to ensure the right of the accused to a fair trial.

3. The fulfilment of certain obligations relating to the right to health — although not all — may depend on available resources and be progressively realized. It is important to scrutinize whether States' resources are used efficiently in realizing the right to health. It is equally important to examine the totality of those resources and review the proportion employed in ensuring the right to health. States' policies to progressively realize the right to health should be reasonable, pay special attention to vulnerable groups, be formulated with the participation of affected communities and fulfil, at a minimum, States' core obligations.

4. Globalization and market liberalization have afforded transnational corporations the opportunity to enter into domestic markets, resulting in their growing domination in world markets. While transnational corporations have the ability to influence international and domestic policies, States have been unable to regulate those corporations to prevent them from violating the right to health. The efforts that have to date been made to curb the activities of transnational corporations have been only voluntary and have not persuaded industries to prevent violations of the right to health. In addition, international investment agreements and investor-State dispute settlement systems benefit transnational corporations at the cost of States' sovereign functions of legislation and adjudication. Existing international investment agreements have no checks on the activities of transnational corporations and many do not recognize States' prerogative to legislate and enforce health-related laws. This power asymmetry is perpetuated by the fact that States often have no ability under international investment agreements to initiate disputes against transnational corporations for violating the right to health. Furthermore, investor-State dispute settlements suffer from bias, opacity and arbitrariness. They prevent affected third parties from gaining access to the system to demonstrate the violation of the third party's right to health and receive a remedy.

II. Justiciability of the right to health

5. While the enforcement of the right to health has made great strides since the development of the right to health framework, justiciability of the right remains contested. The Committee on Economic, Social and Cultural Rights confirms the justiciability of economic, social and cultural rights generally, but does not elaborate on their justiciable components.[1] All the components of the right to health are justiciable and courts have adjudicated on and enforced the specific obligations of the right to health.

6. Economic, social and cultural rights have historically been accorded less attention than civil and political rights, given that they have erroneously been seen as non-justiciable because of alleged inherent differences between the two sets of rights. Initially, only one international human rights covenant, containing both civil and political rights and economic, social and cultural rights, was envisaged. When it came to drafting that unified instrument, however, the Commission on Human Rights believed that the nature of the rights were different and convinced the General Assembly of the necessity of two separate covenants (A/2929, chap. II, para. 9). The rationale was that "[civil and political rights] were rights of the individual 'against' the State, i.e., against unlawful and unjust action of the State", while economic, social and cultural rights required States to take positive action (ibid., para. 10).

7. The division between both sets of rights is artificial, given that there is no intrinsic difference between them. Both may require positive actions, are resource dependent and are justiciable. The requirement to take "necessary steps" in the International Covenant on Civil and Political Rights (art. 2 (2)) is a positive obligation that requires time and resources (A/56/55, paras. 21-23). For example, the right to a fair trial requires States to provide courtrooms, trained professionals and other resources that require time, money and expertise to develop. The Human Rights Committee states that the International Covenant on Civil and Political Rights imposes both negative and positive obligations on States.[2] Civil and political rights were assumed to be justiciable and immediately enforceable because the necessary infrastructure and the means of enforcement already existed when the covenants were drafted.

8. The Vienna Declaration and Programme of Action stresses the indivisible, interdependent and interrelated nature of the two sets of rights. This is reinforced by the necessity of the realization of one to fulfil the other. For example, ensuring equal treatment of men and women in all spheres of their lives, such as the right to found a family, contained in article 23 (2) of the International Covenant on Civil and Political Rights, cannot be achieved unless the right to sexual and reproductive health of women is realized by ensuring their right to access health facilities, goods and services.[3]

9. Dignity underlies all human rights and was included in the Universal Declaration of Human Rights and both covenants. In its resolution 421 (V) E, the General Assembly recognized that dignity requires full enjoyment of both civil and political rights and economic, social and cultural rights. Some domestic and regional

[1] General comment No. 9 (1998), para. 10.

[2] Human Rights Committee, general comment No. 31 (2004), paras. 6-8.

[3] Committee on Economic, Social and Cultural Rights, general comment No. 14, para. 14.

courts have torn asunder the artificial division between the two sets of rights by developing a justiciable right to health through the recognition of dignity. For example, the Supreme Court of India found that to "enhance the dignity of the individual" the right to life should include the right to the basic necessities of life.[4] That right has itself become a stand-alone aspect of the right to health. The Inter-American Court of Human Rights views the right to life as containing a positive obligation to "generat[e] minimum living conditions that are compatible with the dignity of the human person", which includes providing the underlying determinants of health for vulnerable groups.[5]

10. The right to health imposes overlapping obligations of immediate effect on States. They include the immediate obligations of non-discrimination and to take steps towards the progressive realization of rights, the core obligation to ensure the minimum essential levels of the right and the obligations to respect and protect. Immediate obligations are outside the ambit of article 2 (1) of the International Covenant on Economic, Social and Cultural Rights. Core obligations are the minimum essential level of a right[6] and are not progressively realized. Duties to respect and protect are akin to obligations under the International Covenant on Civil and Political Rights to respect and ensure — because the duty to ensure includes the duty to protect[7] — which indisputably are justiciable.

11. These obligations of immediate effect may in fact be dependent on resources for their implementation. For example, States may not want to provide expensive medicine, but in cases of essential medicines, they are required to fulfil this obligation.[8] Even if an obligation of immediate effect depends on resources, a State may not rely on the lack of resources as a defence or excuse for not fulfilling the obligation.

12. The inherent justiciability of these components of the right to health has been demonstrated by the decisions of regional and domestic courts.

13. Courts are experienced in adjudicating the immediate obligation of non-discrimination with regard to health. For example, in *Eldrige v. British Columbia (Attorney General)*, the Supreme Court of Canada found that the Medical and Health Care Services Act discriminated against deaf and hard of hearing people because its lack of provision for sign language interpreters denied them equal benefits under the law.

14. As the United Nations High Commissioner for Human Rights noted in a report to the Economic and Social Council, retrogressive measures are presumptively a violation of the obligation to take steps towards the progressive realization of economic, social and cultural rights (E/2007/82, para. 19). States have the burden to demonstrate that retrogression is not a violation, making the adjudication necessary to determine whether a violation in fact occurred. Retrogression was assessed in decision No. 39/84 of 1984 of the Constitutional Court of Portugal in a case where the Government had attempted to repeal the law that established the National Health

[4] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others*, 1981, paras. 6 and 8.

[5] *Yakye Axa Indigenous Community v. Paraguay*, judgement of 17 June 2005, paras. 162-165.

[6] See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 10.

[7] Human Rights Committee, general comment No. 31, para. 8.

[8] *Delhi High Court, Mohd. Ahmed (Minor) s. Union of India*, April 2014, para. 68.

Service. The Court found that, once a State fulfils a constitutional obligation, the Constitution protects against abolishment, turning the obligation from a purely positive one to both a positive and a negative obligation.

15. Core obligations have been adjudicated under the right to life, which obliges the State to ensure the necessities for life. For example, the Supreme Court of Argentina, in *Reynoso* (2012), found that the State had an obligation to guarantee people access to basic goods and services necessary for their health and life.

16. Courts have enforced obligations to respect and protect with regard to the right to health. The African Commission on Human and Peoples' Rights elaborated, in *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, that the obligation to respect within the right to health requires a State "to respect the free use of resources" of an individual or group "for the purpose of rights-related needs".[9] In *Marangopoulos Foundation for Human Rights v. Greece*, the European Committee of Social Rights held that the State must engage in stronger regulatory practices to protect air quality, including the regulation of private actors, to protect its obligation under the right to health.[10]

17. Only judicial or quasi-judicial bodies and not purely administrative mechanisms can provide access to effective remedies as required by the right to health framework. Effective remedies require an adjudicator to provide appropriate reparation. Only an adjudicator can assess whether the right to health has been violated and provide reparation that includes restitution and guarantees of non-repetition. Restitution often requires imposing an obligation on a third party, such as requiring a hospital to provide essential medicines, and guarantees of non-repetition can be obtained only through structural policy changes that involve other government agencies. Administrative remedies are limited to violations of the relevant statute, and the scope of the statute does not allow the imposition of obligations on other agents and thus cannot provide effective remedies.

18. Any debate about the general justiciability of the right to health ended with the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on 5 May 2013 and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure on 14 April 2014. It is recommended that States ensure that the right to health is justiciable in their domestic jurisdictions. Most individual obligations of the right to health are clearly justiciable, and only obligations to fulfil that are progressively realizable require further analysis to confirm their justiciability.

III. Progressive realization of the right to health

19. Similar to other economic, social and cultural rights, and in keeping with article 2 (1) of the Covenant, the right to health allows States to realize some rights progressively. The progressive realization of the right to health obligations is premised on the understanding that States with limited resources may have the capacity to implement health programmes only in a phased manner.

[9] Communication No. 155/96, 2001, para. 45.

[10] Complaint No. 30/2005, 2006, para. 203.

20. The reliance on States' available resources to realize the right to health adds complexities to an adjudicator's ability to decide such issues. For example, adjudicating whether the State has taken steps to the maximum extent of its available resources may involve the determination of the extent of the State's available resources. Adjudicators have, however, been loath to scrutinize statements concerning the available resources proffered by States because decisions on budgetary allocations are generally deemed to be within the purview of the legislature and executive, and thus outside the proper scope of judicial inquiry. In *Soobramoney v. Minister of Health, KwaZulu-Natal* (1998), the Constitutional Court of South Africa concluded that people with chronic renal failure were not entitled to dialysis treatment by the State free of cost, as were emergency cases of renal failure. The petitioner's right to receive dialysis treatment was analysed under the constitutional obligation of South Africa to progressively realize its citizens' right to health and its obligation to provide emergency health care. The Court found that the Government had proved that no funds were available to provide all persons with chronic renal failure with dialysis treatment free of cost and that it therefore had to accord priority to emergency care. The Court reached that conclusion after reviewing evidence that the Department of Health had already overspent its budget. It did not delve further into whether the amount allocated was sufficient to achieve a reasonable level of health.

21. Adjudicators' inability or reluctance to inquire into budgetary allocations affecting the amount of resources available may be fostered in part by the fact that the term "available resources" has not been clearly defined within the right to health framework or general comment No. 3. Available resources could be interpreted in diverse ways. It could mean a State's entire gross domestic product or a specified percentage thereof, or it could be limited to the amount allocated to the State's health budget or limited to the amounts allocated to a particular health concern. Furthermore, although general comment No. 3 indicates that available resources include resources available through international assistance (para. 13), it falls short of clarifying whether available resources cover the amount actually available or the amount that could have been available had the State exerted itself in obtaining such aid. Moreover, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights indicate that States have an obligation to develop societal resources as a way of increasing their available resources, but do not indicate whether available resources should include the amount of societal resources that a State could reasonably develop but has not yet developed (para. 24). It is clear, however, that the term "available resources" refers to the totality of a State's "real" resources (e.g. informational, technical, organizational, human, natural and administrative) above and beyond budgetary allocations.[11] Adjudicators reviewing the amount of available resources proffered by States should keep in mind that the State is required to administer the existing budget efficiently and mobilize additional resources, which may include, for example, changes to the State's taxation policy or smart incurrence of debt.[12]

[11] See Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (London, Routledge, 2014), chap. 3.

[12] Diane Elson, Radhika Balakrishnan and James Heintz, "Public finance, maximum available resources and human rights", in A. Nolan, R. O'Connell and C. Harvey, eds., *Human Rights and Public Finance: Budget and the Promotion of Economic and Social Rights* (Oxford, United Kingdom of Great Britain and Northern Ireland, Hart, 2013).

22. Sufficient resources available to a State should, however, be allocated to achieve the realization of other economic, social and cultural rights, in addition to the plethora of competing demands on the State. When considering allocation to other competing economic, social and cultural obligations, those of an immediate or core nature should take precedence. Available resources should imply the maximum amount of resources that can be allocated to a specific health objective without compromising other essential services.[11]

23. Although what constitutes available resources will differ by context, the term requires elaboration in order to guide States and assist adjudicators in deciding whether the amount of available resources proffered by States is acceptable. Even if adjudicators do not give directions with regard to the allocation and use of resources, they should closely scrutinize the State's view of the amount of maximum resources available to them, given that it is the Government's burden to demonstrate that the amount of its available resources does not permit the fulfilment of some State obligations. This may require adjudicators to scrutinize the budget to determine whether the allocation to the health sector or to a particular health goal is inadequate. A State's decreasing budgetary allocation for its right to health obligations vis-à-vis its increasing gross domestic product or increasing allocation to areas other than those relating to human rights may be evidence that the State has chosen not to allocate available resources to fulfil that right, which may evidence a breach of its progressively realizable obligations.[11] Adjudicators should also inquire as to whether the State has sufficiently exerted itself in obtaining international aid or developing societal resources to expand the amount of resources available. States should be obliged to provide information regarding the calculation of their available resources, budget allocations and efforts to increase the available resources in an open and transparent manner to facilitate a full and fair review by the adjudicator.

24. Where a progressively realizable obligation has a core component, adjudicators should inquire as to whether the State has fulfilled its obligation in that regard. When such rights have not been safeguarded, courts have found violations of the relevant right without even delving into an analysis of a State's available resources. For example, the Inter-American Court of Human Rights noted that the State obligation to guarantee access to a decent life must be read in view of the State's progressively realizable obligations set forth in article 26 of the American Convention on Human Rights.[13] However, the Court did not use the concept of progressive realization to qualify the obligation of the State to provide minimum living conditions that were compatible with the dignity of the human person, but rather found that the State had breached the claimants' right to life and was required to provide, inter alia, medicine, food, clean water and sanitation facilities.[14] Thus, in accordance with the core obligations under the right to health framework, where adjudicators determine that certain fundamental human rights have been violated, they may find that the State has breached its relevant obligations without delving into the question of whether the State had the available resources to satisfy such obligations.[15]

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[13] *Yakye Axa Indigenous Community v. Paraguay*, judgement of 17 June 2005, para. 163.

[14] Ibid., paras. 176 and 221.

[15] See Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, judgement of 29 March 2006; *Ximenes-Lopes v. Brazil*, judgement of 4 July 2006.

25. Courts have also adjudicated the utilization by the State of available resources vis-à-vis existing policies and the obligation of non-retrogression. In a case where the court held that lack of available resources cannot be a justification for retrogression of policies, it unambiguously expressed that benefits promised under health-care programmes should be delivered and issued directions to the Government to that effect.[16] Moreover, should the adjudicators find that a sum has been allocated to the realization of a particular health right but has not been used, or such sum has been diverted to another use, they should hold that the State is not using the maximum of its available resources and may therefore be in violation of its progressively realizable obligations.[11] It is worth noting, however, that resources allocated to non-health rights may have the effect of improving access to and availability and quality of health facilities, goods and services. For example, funds spent on roads can improve access to medical clinics.[12]

26. For a State to be in compliance with its progressively realizable obligations, the amount of available resources must be efficiently allocated. Available resources should be considered efficiently allocated if such allocation reduces barriers to non-discriminatory access to available and acceptable-quality health facilities, goods and services. Failure to curb corruption, which results in the inefficient use of resources, may be considered a breach of a State's progressively realizable obligations.[12] States must also ensure that what appears to be greater efficiency is not simply masking the transfer of such costs to non-State actors. For example, a policy that encourages patients to spend less time in the hospital, thus reducing the financial cost per treatment, may in reality shift those costs to the patient's home caregivers.[12]

27. Some domestic courts have focused on judicial review of the process, rather than the substance, of policymaking. Courts have confirmed that a State is in compliance with its progressively realizable obligations if the policymaking process was reasonable.[17] The Constitutional Court of South Africa, for example, has considered the following factors in determining whether a housing policy and a water distribution policy was "reasonable": consideration given to vulnerable groups and emergency situations; flexibility of the policy to being updated upon continuing governmental review; attention paid to the short-term, medium-term and long-term needs; a transparent, participatory and well-considered process; efficient implementation of the policy; equitable coverage; retrogression in policy; and whether discrimination was tied to a legitimate government policy.[18] Even where adjudicators find that the process has been reasonable, they may also review whether the implementation of the policy has resulted in a disproportionately negative impact on a particular vulnerable group, which may evidence a breach of the State's progressively realizable obligations.

28. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights also requires the Committee to "consider the reasonableness of the steps taken by the State Party" (art. 8 (4)). The Committee has laid out several considerations to be taken into account when determining reasonableness, such as

[16] High Court of Delhi, *Laxmi Mandal v. Deen Dayal Haringagar Hospital and others*, 2010, paras. 61-70.

[17] See Constitutional Court of South Africa, *Minister of Health v. Treatment Action Campaign*, 2002; High Court at Nairobi, *Okwanda v. Minister of Health and Medical Services and others*, 2013.

[18] *South Africa v. Grootboom*, 2001; *Mazibuko and others v. City of Johannesburg and others*, 2009.

whether measures were deliberate, concrete and targeted; whether non-discrimination and non-arbitrariness were ensured; whether allocation of resources was in accordance with international human rights standards; whether the policy utilized the least restrictive option; the time frame of the policy; and whether the situation of vulnerable groups was taken into account (E/C.12/2007/1, para. 8). Vulnerable groups should not be limited to those specific groups mentioned in general comment No. 14, but should include any group that is disproportionately affected by a particular ailment or otherwise marginalized on account of its members' political, social or economic exclusion; discrimination and stigmatization suffered by that group; restrictions in law or in practice on giving informed consent or exercising full autonomy by members of that group; or the group's inability to enforce rights, gain access to State benefits or enjoy regulatory protection.

29. In reviewing whether a State has fulfilled its obligations under the Covenant, it is important to consider that even well-considered policies making use of a State's maximum available resources may lead to poor health outcomes owing to external circumstances, such as an influx of refugees, an outbreak of an epidemic or an economic recession. Even in such cases of resource constraint, States should fulfil their core obligations and other immediate obligations without discrimination. States should not be allowed to use external circumstances as an excuse for retrogressive measures such as cutting certain health-related policies as part of a redistribution of funds from the health sector.

IV. Enforcement of the right to health

30. Enforcement of a State's obligations is essential to the enjoyment of the right to health. Unfortunately, many legal judgements on economic, social and cultural rights are not fully implemented by States. To promote the implementation of judgements, adjudicators are encouraged to develop specific and targeted decisions that recognize the State's capacity and include monitoring by the court and civil society participation.

31. Courts should be mindful of the context and objectives when designing specific directions for the implementation of judgements containing positive obligations. Judgements that provide a framework of specific processes for specific agencies may overcome barriers to implementation that a general judgement does not. This approach, rather than dictating specific objectives, can mitigate concerns of violating separation of powers. In the landmark *T-760/08* judgement (2008) that led to systemic change of the Colombian health-care system, the Constitutional Court of Colombia did not dictate reforms but gave direction to policymakers to define objectives, develop appropriate policies, build institutional capacity and justify each decision with information.[19] With regard to progressively realizable obligations in particular, courts should consider that any reform must be sustainable in order to increase social acceptance of the judgement and ensure a sustainable health system.[20]

[19] See Manuel José Cepeda-Espinoza, "Transcript: social and economic rights and the Colombian Constitutional Court", *Texas Law Review*, vol. 89, p. 1703.

[20] Ibid., p. 1701.

32. Monitoring is critical for the full implementation of complex judgements. The writ of continuing mandamus has been used by the Supreme Court of India to provide continuous judicial oversight of agencies when a traditional writ of mandamus could not overcome agency inertia.[21] The Constitutional Court of Colombia developed a special monitoring chamber to oversee the implementation of *T-760/08* and devoted a section of its website to all the orders enforcing the judgement.[22] To maximize implementation, monitoring by the court should be done in conjunction with public participation.[23]

33. Meaningful participation by affected communities and other stakeholders, together with access to health information, is not only an essential element of the right to health,[24] but also a critical tool for monitoring implementation. Courts are positioned to promote access to information as part of implementation monitoring, or even to find a constitutional right to receive accurate health-related information from public officials.[25] Participating stakeholders can support implementation jointly with the State by providing technical expertise and communicating the interests of affected communities.

34. States are encouraged to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and recognize the competence of the Committee on Economic, Social and Cultural Rights to receive and consider inter-State communications. Enforcement through the Optional Protocol will further develop the content and jurisprudence of the right to health. Health-related cases have been adjudicated at the international level, for example in the *Alyne da Silva Pimentel v. Brazil and L.C. v. Peru* cases before the Committee on the Elimination of Discrimination against Women.[26] While the Committee adopted decisions calling for specific remedies for the complainants in those cases, it also adopts general recommendations that promote policy change. General recommendations are necessary to promote the enjoyment of the right to all similarly affected people, not only the authors of communications. They should be incorporated into friendly settlements between the parties, with input from third parties, because States can use friendly settlements to provide remedies not only for the author but for all similarly affected people.

35. States, whether directly or indirectly, may have an impact on the enjoyment of the right to health within another State. If a State is unable to protect the right to health of its people from foreign actors using domestic mechanisms, it is encouraged to use the inter-State communications mechanism under the Optional Protocol to do so.

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[21] See *Vineet Narain and others v. Union of India and another*, 1998.

[22] See Constitutional Court of Colombia, Seguimiento al cumplimiento de la Sentencia T-760 de 2008 (Monitoring compliance with judgement T-760 of 2008).

[23] See César Rodríguez-Garavito, "Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America", *Texas Law Review*, vol. 89, p. 1694.

[24] See general comment No. 14, para. 12 (b) (iv).

[25] See Constitutional Court of Colombia, *T-627/12*, judgement of 10 August 2012, p. 125.

[26] Communication No. 17/2008, views adopted on 25 July 2011, and communication No. 22/2009, views adopted on 17 October 2011.

V. Transnational corporations

36. Globalization and trade liberalization have allowed transnational corporations to gain greater and easier access to otherwise closed markets. Their increasing presence in the world economy has enabled them to influence international and domestic law-making and infringe upon States' policy space. They have influenced food consumption patterns[27] and promoted the use of tobacco, especially in developing countries.[28] They have also affected the rights of large communities with impunity, causing displacement,[29] contamination of groundwater[30] and loss of livelihood.[31] They have directly perpetrated serious human rights violations, in particular in developing and least developed countries.[32] They have thus seriously affected the laws, policies and social and economic environments of States and have violated the economic, social and cultural rights of individuals and communities, including the right to health.

37. It may be difficult for States or affected individuals to hold foreign transnational corporations accountable for harmful actions that were orchestrated through their domestic subsidiary. The involvement of multiple jurisdictions may effectively protect transnational corporations from liability for their human rights violations[33] or may lead to protracted litigation in multiple forums.[34]

38. The magnitude of violations by transnational corporations and the ease with which they can evade responsibility for such violations call for an international mechanism to hold them liable for human rights abuses. Such a mechanism should supplement domestic laws rather than diminish the importance of domestic law. The mechanism should therefore enable States and individuals to hold transnational corporations to account for their human rights violations.

39. Previous efforts made in international forums to confer obligations on transnational corporations have resulted only in voluntary guidelines.[35] In 2003, the Subcommission on the Promotion and Protection of Human Rights approved norms

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[27] See Corinna Hawkes, "Uneven dietary development: linking the policies and processes of globalization with the nutrition transition, obesity and diet-related chronic diseases", *Globalization and Health*, vol. 2, No. 4 (2006).

[28] See M. Otañez, H. Mamudu and S. Glantz, "Tobacco companies' use of developing countries' economic reliance on tobacco to lobby against global tobacco control: the case of Malawi", *American Journal of Public Health*, vol. 99, No. 10 (October 2009).

[29] See Human Rights Watch, "*How Can We Survive Here?": The Impact of Mining on Human Rights in Karamoja, Uganda* (2014).

[30] See N. Cingotti and others, "No fracking way: how the EU-US trade agreement risks expanding fracking", Issue Brief (Transnational Institute, March 2014).

[31] Office of the United Nations High Commissioner for Human Rights, "India: urgent call to halt Odisha mega-steel project amid serious human rights concerns". Available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13805&LangID=E.

[32] Olivier De Schutter, "The accountability of multinationals for human rights violations in European law", New York University School of Law, Center for Human Rights and Global Justice Working Paper No. 1, 2004.

[33] Amnesty International, "India: court decision requires Dow Chemical to respond to Bhopal gas tragedy", 3 July 2013.

[34] Reuters, "Ecuador plaintiffs file lawsuit in Canada against Chevron", 30 May 2012.

[35] The Guidelines for Multinational Enterprises adopted by the Organization for Economic Cooperation for Development in 1976; the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy adopted by the International Labour Organization in 1977; and the United Nations Global Compact initiated by the Secretary-General in 1999.

on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2), which sought to confer non-voluntary direct obligations on transnational corporations and business enterprises. The Commission on Human Rights did not adopt the norms, owing in part to strong opposition from States and business entities. In 2005, the Commission, in resolution 2005/69, requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.

40. The Special Representative submitted, in his final report in 2011, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex). The first pillar, protect, reflects the existence in international human rights law of a binding obligation on States to protect individuals from actions of third parties. The pillar requires States to take measures such as instituting laws to hold transnational corporations accountable for their transgressions (principle 1). It could be argued, however, that the State obligation to protect, which is already an important obligation of States under international human rights law, has been ineffective against transnational corporations.

41. The second pillar reflects the obligation of transnational corporations to respect human rights (principle 11). Pursuant to the responsibility to respect, transnational corporations have a responsibility to conduct due diligence to identify and address adverse human rights impacts caused by their activities; such due diligence should involve the participation of affected communities (principle 18, commentary). However, because the framework and Guiding Principles reflect existing international law standards and reflect the responsibility to respect only as based on "a global standard of expected conduct" for corporations rather than specific obligations enshrined in binding treaty provisions (principle 11, commentary), it has been argued that there is no legally binding obligation requiring transnational corporations to conduct this due diligence.[36] The rationale appears to be that non-binding responsibilities make good market sense, which itself should provide incentives for transnational corporations to comply with their pledges. For example, the Guiding Principles mention that compliance with responsibilities may be ensured where a transnational corporation institutes policies and procedures that set financial and other performance incentives for personnel.[37] However, providing incentives for compliance makes respect for rights a means to attain an end (the promised incentive), but does not foster respect for rights in and of themselves.

42. The third pillar of the framework requires States to ensure individuals' access to an effective remedy through judicial, administrative, legislative or other appropriate means when abuses occur within their territory and/or jurisdiction (principle 25). An aspect of access to remedy is that corporations should establish or participate in effective, operational-level grievance mechanisms (principle 29). Given that access to remedy is an aspect of States' obligation to protect, however,

[36] See Olga Martin-Ortega, "Human rights due diligence for corporations: from voluntary standards to hard law at last?", *Netherlands Quarterly of Human Rights*, vol. 32, No. 1 (March 2014), pp. 55-57.

[37] Ibid., p. 16.

States' inability or unwillingness to hold transnational corporations accountable may lead to a lack of available and effective remedies against the corporations.[38]

43. The Guiding Principles also fail to take into consideration the existing political context, whereby developing countries may be vulnerable to undue influence from transnational corporations. Business interests may be protected at the cost of the human rights of those affected communities that remain dependent on States to hold corporations accountable for violations. Non-binding responsibilities have therefore not prevented transnational corporations from violating human rights.[39]

44. In this regard, the Special Rapporteur notes with satisfaction the adoption of resolution 26/9 by the Human Rights Council in which the Council decided to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights with the mandate to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The Special Rapporteur welcomes this opportunity to develop an instrument that will remedy the current imbalance between corporations, States and individuals.

45. There is an urgent need for an international instrument that can address the increasing complexities presented by transnational corporations' multi-jurisdictional organization and global influence. Moreover, because not all States have a robust regulatory mechanism, owing either to their poor negotiating power or because they are unwilling to hold domestic corporations accountable for harms caused, obligations should also be conferred on domestic corporations.

46. Along with the required accountability and monitoring mechanisms, a strong and effective enforcement mechanism is needed to remedy and discourage violations. An adjudicatory mechanism to examine individual or State complaints against transnational and domestic corporations should be established. Individuals should have the right to remedy both in their home State and in the home State of the transnational corporation where the latter does not regulate those activities of the corporation that violate the individual's right to health.

47. In the meantime, a declaration along the lines of the Universal Declaration of Human Rights could be adopted conferring specific human rights obligations on private corporations, especially transnational corporations. Imposing specific human rights obligations would provide a structure to the rights and obligations involved in this paradigm.

A. International investment agreements

48. To encourage economic activity and attract investment, States, especially those that are developing and least developed, may enter into international investment

[38] See Iman Prinhandono, "Transnational corporations and human rights violations in Indonesia", *Australian Journal of Asian Law*, vol. 14, No. 1 (2013), pp. 1-23; and G. Wass and C. Muslime, *Business, Human Rights, and Uganda's Oil. Part II: Protect and Remedy: Implementing State Duties under the UN Framework on Business and Human Rights* (ActionAid International Uganda and International Peace Information Service, 2013).

[39] See Chris Albin-Lackey, "Without rules: a failed approach to corporate accountability", in Human Rights Watch, *World Report 2013*.

agreements. Such agreements allow transnational corporations to reduce States' policy space and have been instrumental in increasing the influence of transnational corporations on States' ability to institute public health policies.[40]

49. International investment agreements are treaties concluded between two or more States that facilitate an enabling economic environment for transnational corporations to invest in host States. They are promoted as tools to boost domestic economies but may have the effect of overriding States' sovereignty. In some States, business executives may enter into such agreements and bind States without any discussion among, or the agreement of, elected representatives. In addition, States may not be able to terminate such agreements without facing economic and financial consequences. Given that the agreements are concluded between States, they do confer no obligations on transnational corporations to respect, protect and fulfil the right to health, allowing corporations to continue profit-making activities even if they are violating individuals' right to health.

50. The rights to information and to participate in the decision-making process are essential for the enjoyment of the right to health. Those elements of the right to health framework are undermined when international investment agreements are negotiated and concluded in secrecy. Affected communities should be able to participate in negotiations. Making information regarding the negotiations public can allow communities and civil society organizations to pressure States to refrain from signing such agreements or to assist States in asserting themselves during negotiations, which may facilitate the exclusion of provisions that may result in a breach of human rights.

51. The right to access information has been denied to affected communities on the grounds that disclosure of such information may harm the State's economic interest and should therefore be kept confidential.[41] Disturbingly, the practice of withholding information from stakeholders such as civil society groups has been held to be non-discriminatory, even where the same information was provided to corporations with the justification that corporations have expertise in matters relating to free trade agreements.[42] Such inequity in access to information can enable corporations to influence the content of an international investment agreement in their favour.

52. International investment agreements benefit transnational corporations as investors because such corporations are granted rights protective of their investments in the host State, such as the right to fair and equitable treatment. Transnational corporations also have the right to initiate disputes before international commercial arbitration tribunals for alleged violations by the host State and for State infringement on the corporation's profit-making activities or potential profits. States, on the other hand, may be unable to initiate disputes against investors because transnational corporations, as non-signatories, have no obligations under

[40] See Eric Peterson and Kevin Gray, "International human rights in bilateral investment treaties and in investment treaty arbitration", International Institute for Sustainable Development, 2003.

[41] See Central Information Commission (India), *D. G. Shah v. Ministry of Commerce and Industry, Department of Industrial Policy and Promotion*, 2011.

[42] See European Court of Justice, *Stichting Corporate Europe Observatory v. European Commission*, case T 93/11, judgement of 7 June 2013.

international investment agreements.[43] Such agreements perpetuate and exacerbate an asymmetrical relationship between investors and States.

53. International investment agreements impose obligations on States vis-à-vis investors that may affect States' power to introduce health laws in the public interest. States may have to modify their laws to accommodate investors' rights, even though such modifications may increase the risk of violating individuals' right to health. Free trade agreements, for example, may limit the enjoyment of the right to health of individuals by preventing States from using the public health flexibility under the Agreement on Trade-Related Aspects of Intellectual Property Rights.[44] Pharmaceutical companies may be able to challenge the patent laws of host States if such laws do not comply with investors' rights under the free trade agreement, even though such patent laws may be compliant with the Agreement on Trade-Related Aspects of Intellectual Property Rights. States may thus be unable to check the increasing cost of medicines, which undermines their core obligation to ensure access to health facilities, goods and services, including essential medicines, especially for vulnerable groups.

54. International investment agreements may provide for exceptions that can be used by States to defend laws in the public interest, such as public health laws. Even where international investment agreements contain such exceptions, however, investor rights may trump them. After Uruguay had entered into a bilateral investment treaty with Switzerland, it adopted public health measures on the packaging and advertisement of cigarettes, in accordance with local laws, which were enacted pursuant to the World Health Organization Framework Convention on Tobacco Control. Although those measures accorded with the public health exception in the bilateral investment treaty, Phillip Morris International initiated a dispute against Uruguay, claiming that its law was unreasonable and breached the guarantee of fair and equitable treatment.[45]

55. International investment agreements are treated as a stand-alone legal code and often do not contain references to the right to health. They should, however, be interpreted in a manner that does not conflict with human rights law because the purpose of both development-stimulating investment treaties and human rights laws is to benefit individuals. Under the current regime, States may be vulnerable to dispute settlement procedures when a State breaches an obligation under the agreement in order to comply with its human rights obligations. This was the case when the Ethyl Corporation submitted a claim against a public health decision by the Government of Canada to impose a trade ban on a controversial gasoline additive produced by Ethyl Corporation.[46] In another case, the tribunal noted that, though the claimant's property was expropriated in furtherance of environmental

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[43] M. Toral and T. Schultz, "The State, a perpetual respondent in investment arbitration? Some unorthodox considerations", in Michael Waibel and others, eds., *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), p. 578.

[44] Joint United Nations Programme on HIV/AIDS, *The Potential Impact of Free Trade Agreements on Public Health* (Geneva, 2012).

[45] See International Centre for Settlement of Investment Disputes, *Phillip Morris Brands Sàrl, Phillip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, case No. ARB/10/7, decision on jurisdiction of 2 July 2013.

[46] *Ethyl Corporation v. Canada*, award on jurisdiction judgement of 24 June 1998.

public interests and legitimate, expropriation by the State "did not alter the legal character of the taking for which adequate compensation must be paid".[47]

56. The high cost of arbitration and the threat of an adverse judgement can create a chilling effect on States, dissuading them from fulfilling their right to health obligations.[48] These disputes may also deplete States' resources, which can affect their ability to progressively realize the resource-dependent aspects of the right to health.

57. Although international investment agreements may contribute to the economic development of a country, States should ensure that protection of human rights, including the right to health, is incorporated into those agreements. Human rights must be respected, protected and fulfilled at all times, and should be the primary concern of all action by States. International investment agreements should therefore expressly provide for States' human rights obligations, which should be able to override investors' rights in specific cases.

58. The ability of individuals to enjoy their right to health cannot be subject to contractual rights of investors, given that the right to health is fundamental to the dignity of individuals.

59. States should review the current system of investment treaties to create a level playing field. During negotiation, review or renegotiation, international investment agreements should ensure that States have the right to change laws and policies in furtherance of human rights, regardless of the impact of such change on investor rights. Some 40 States have already begun renegotiating bilateral investment treaties to minimize their vulnerability to disputes and to limit investor rights.[49] In 2011, Australia amended its trade policy to exclude provisions in trade agreements that could "limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme"[50]. Until international law can hold transnational corporations directly accountable for their violations of human rights, States should incorporate provisions in international investment agreements that enable States to hold transnational corporations liable for such violations under the domestic law of either the home or the host State. States should also ensure that their ability to implement human-rights-friendly laws is not in any way hindered by the agreement.

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[47] See International Centre for Settlement of Investment Disputes, *Compania del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, case No. ARB/96/1, 17 February 2000, para. 71.

[48] D. Gantz, "The evolution of FTA investment provisions: from NAFTA to the United States-Chile Free Trade Agreement", *American University International Law Review*, vol. 19, No. 4 (2003), p. 684.

[49] See Mahnaz Malick, "Recent developments in international investment agreements: negotiations and disputes", International Institute of Sustainable Development, 2011; Y. Haftel and A. Thompson, "When do States renegotiate international agreements? The case of bilateral investment treaties", 2013; United Nations Conference on Trade and Development, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf.

[50] See D. Gleeson, K. Tienhaara and T. Faunce, "Challenges to Australia's national health policy from trade and investment agreements", *Medical Journal of Australia*, vol. 196, No. 5 (2012), quoting the Department of Foreign Affairs and Trade of the Government of Australia.

B. Investor-State dispute settlement

60. International investment agreements include an arbitration clause for investor-State dispute settlements that can be invoked only by transnational corporations against host States for alleged violations of the corporation's rights. The arbitration clause determines the place of arbitration, the applicable law and the procedure for appointing arbitrators. As at 2013, there were 568 known cases of arbitration under international investment agreements. Most were brought against developing States. A total of 85 per cent of the cases were brought by investors from developed countries.[51] The system is riddled with problems.

61. The number of arbitration cases filed against States is likely to rise in times of financial crisis. For example, since its financial crisis in 2001 and the introduction of economic reforms, Argentina has faced more than 50 arbitration cases.[51] Similarly, Spain and Greece saw a sharp increase in arbitration cases against them after their financial crises[52] and more than 10 arbitration cases were registered against Egypt after the Arab Spring.[53] In such crises, States may need to realign their economic and social policies within the changed climate. Although such changed policies may be in the public interest, the altered policies might threaten investments and prevent States from fulfilling their obligations under the international investment agreement.

62. The current system of investor-State dispute settlement also suffers from bias and conflicts of interest. The dispute settlement is controlled by a small clique of arbitrators and lawyers, and the same person may be counsel, arbitrator and adviser to an investor or State at different times.[54] Many arbitrators share close links with business communities and may be inclined towards protecting investors' profits.[55] This can affect the independence and neutrality of arbitrators, is contrary to the principle of fairness and further compromises the integrity of arbitration under international investment agreements.

63. Annulment applications by States on the ground of bias have in many instances been rejected. In one case, the State argued for the recusal of an arbitrator on the ground that the award would be used to further the arbitrator's argument as counsel in another case.[56] The State lost. An issue of bias also arises where an arbitrator has an interest in the investor's business. In one such case, the State's application to annul the award was rejected because there was "no material effect on the final decision of the Tribunal, which was in any event unanimous".[57]

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[51] See http://unctad.org/en/Docs/webdiaeia20113_en.pdf.

[52] See Cecilia Olivet and Pia Eberhardt, *Profiting from Crisis* (Amsterdam/Brussels, Transnational Institute and Corporate Europe Observatory, March 2014).

[53] See www.brownrudnick.com/news-resources-detail/2013-10-beyond-the-realm-of-icsid-al-kharafi-sons-co-vs-libya.

[54] See International Centre for Settlement of Investment Disputes, *Azurix Corporation v. The Argentine Republic*, case No. ARB/01/12, 14 July 2006.

[55] See Cecilia Olivet and Pia Eberhardt,, *Profiting from injustice*, ((Amsterdam/Brussels, Transnational Institute and Corporate Europe Observatory, November 2012).

[56] See *Eureko v. Poland*, judgement of 22 December 2006 of the court of first instance of Brussels.

[57] International Centre for Settlement of Investment Disputes, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, case No. ARB/97/3, annulment proceeding, paras. 234-235.

64. The amount of compensation awarded runs into millions of dollars and is an additional blow to developing States, especially those undergoing or recovering from crisis. For example, in *Al-Kharafi v. Libya*, the claimant was awarded more than $935 million.[58] The enormous size of such awards can have a negative effect on the State's ability to implement health policies. For example, in *CME v. Czech Republic*,[59] the compensation awarded to the investor was equal to the entire health budget of the State.[60] States may also have to bear not only legal costs incurred by them during arbitration but also those incurred by the successful claimant.[61] Even where States are successful, they may have to pay a heavy fee for the arbitrators.[62]

65. Moreover, arbitration proceedings are opaque. Except in some cases, no public notice of the arbitration may be issued.[63] Persons not party to the arbitration are often unable to participate in the process as amicus or as an audience to the proceedings. Under some rules, however, non-disputing parties may be able to make submissions under very limited circumstances and at the discretion of the tribunal.[64] In addition, arbitration proceedings are conducted in camera, which prevents persons from following the arbitration unless, as is allowed under some rules, both parties agree to hold an open hearing.[65] Furthermore, the award of the tribunal is often binding on the parties, with no appeal permitted.[66]

66. A public, democratic, open and accountable system of domestic courts has been replaced with private, closed and unaccountable arbitration. Arbitration lacks a system for review that can check arbitrariness. The opaque nature of arbitration, under which some awards are not even made public, protects the parties from the accountability that ensues from an open and transparent system.

67. A transparent and open arbitration system, accountable to communities in host States, should be established urgently to remedy problems plaguing the current system. Arbitration should also be conducted in host States, to facilitate access by affected communities. Disputes could be decided by a panel of arbitrators, selected from an international, permanent and regionally representative pool. Arbitrators should not be allowed to practise as counsel or advisers to investors or States in cases of arbitration.

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[58] See www.italaw.com/sites/default/files/case-documents/italaw1554.pdf.

[59] See http://italaw.com/documents/CME-2003-Final_001.pdf.

[60] M. Desai and A. Moel, "Czech mate: expropriation and investor protection in a converging world", European Corporate Governance Institute Working Paper No. 62/2004, April 2006.

[61] United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, art. 42.

[62] Mahnaz Malik, "The stakes of States in defending investment treaty arbitrations: a game of luck and chance?", International Institute for Sustainable Development, 2011, p. 3.

[63] International Centre for Settlement of Investment Disputes, Administrative and Financial Regulations, regulation 22, Publication.

[64] bid., Rules of procedure for arbitration proceedings, rule 37, Visits and inquiries; submissions of non-disputing parties; *Methanex Corporation v. United States of America*, 15 December 2001, para. 52; International Centre for Settlement of Investment Disputes, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, case No. ARB/05/22), procedural order 5.

[65] UNCITRAL Arbitration Rules, art. 28 (3). http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf.

[66] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 53 (1).

68. Open arbitration conducted by unbiased arbitrators together with limited review will reduce the arbitrariness that has rendered proceedings illegitimate and awards suspect. States should also have the right to initiate disputes against investors that violate the right to health of individuals.

69. Arbitrators' discretion in allowing non-disputing parties to make submissions should be replaced by the right of affected communities to make written and oral submissions.

70. The Special Rapporteur is pleased to note that some States are already challenging the inequities of the current investor-State dispute settlement regime. For example, Ecuador amended its Constitution to prohibit entry into instruments that waive its sovereign jurisdiction in the arbitration of disputes with private individuals or corporations. Consequently, the country withdrew from the Convention on the Settlement of Disputes between States and Nationals of Other States, followed by the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela.[67]

VI. Conclusion and recommendations

71. **There is a need to further clarify the issues of justiciability, progressive realization and enforcement of the right to health. This will help in highlighting the important role of the right to health in the individual's ability to live with dignity. It will also facilitate better planning and implementation of health-related policies. In the context of the current political and economic climate dominated by transnational corporations, steps should be taken to ensure that there are binding legal human rights obligations on transnational corporations towards individuals.**

72. **The Special Rapporteur recommends that States ensure the domestic justiciability of the right to health, including the obligations to respect, protect and fulfil the right to health of individuals.**

73. **To ensure effective enforcement of the right to health in domestic jurisdictions, the Special Rapporteur makes the following recommendations:**

(a) **Specific directions for implementing court judgements and orders that respect, protect and fulfil the right to health should be issued to the relevant authorities;**

(b) **States should ensure that court judgements on the right to health are fully implemented, in the same way as any other judicial order that promotes rights;**

(c) **Judgements and orders should be implemented with the participation of affected communities and other stakeholders;**

(d) **Systems of monitoring the implementation of health-related orders should be created, allowing for continuous oversight by adjudicatory bodies, community and civil society organizations and other stakeholders;**

(e) **Administrative remedies should allow for an adjudicator to review alleged violations of the right to health.**

[67] http://unctad.org/en/Docs/webdiaeia20106_en.pdf.

74. **The Special Rapporteur recommends that States ratify the Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and to the Convention on the Rights of the Child on a communications procedure, thereby recognizing the competence of the respective committees to consider individual communications with a view to ensuring the availability of an international adjudicatory mechanism for individuals whose right to health has been violated. The Special Rapporteur further recommends that States recognize the competence of the Committee on Economic, Social and Cultural Rights to receive and consider inter-State communications.**

75. **With regard to the State's progressively realizable obligations under the right to health, the Special Rapporteur recommends that:**

(a) **The term "available resources" be clarified to guide States and assist adjudicators in determining whether the amount of available resources proffered by States is accurate;**

(b) **Available resources include the maximum amount of resources that can be allocated to a specific health goal without compromising other essential services;**

(c) **The amount of resources available to States be subject to scrutiny through a review of States' budgets and efforts to mobilize additional resources;**

(d) **To facilitate a full and fair review, States should make public, including to adjudicators, information regarding the calculation of their available resources, budgetary allocations and efforts to increase the available resources in an open and transparent manner;**

(e) **States' available resources be determined to be efficiently allocated by focusing on the reasonableness of the policymaking, with special attention paid to the effect on vulnerable groups, and the transparency and participatory nature of such process;**

(f) **States deliver benefits promised under health-care programmes with regard to health facilities, goods and services. Failure to deliver, or the diversion of funds, may be considered a violation of States' right-to-health obligations.**

76. **The Special Rapporteur recommends the adoption of an international treaty that will:**

(a) **Confer specific, binding human rights obligations, including the right to health, on transnational corporations;**

(b) **Prevent investors from encroaching on States' policymaking space;**

(c) **Provide for an accessible and effective adjudicatory forum where States and individuals can hold transnational corporations accountable for violations of the right to health.**

77. **The Special Rapporteur also recommends that, until an international treaty is formulated, States adopt a declaration on human rights obligations of transnational corporations.**

78. **The Special Rapporteur recommends that States review, renegotiate or enter into international investment agreements in an open and transparent manner, with the participation of affected communities and other stakeholders. International investment agreements should include provisions that:**

(a) **Confer human rights obligations on host and home States and investors;**

(b) **Allow host States to modify existing laws, or adopt new laws, to comply with their obligations under the right to health or in times of crisis affecting the entire State;**

(c) **Enable States to initiate disputes when investors do not comply with or violate the right to health.**

79. **The Special Rapporteur recommends that investor-State dispute settlement systems should be made transparent and be modified to:**

(a) **Ensure that arbitrators are unbiased;**

(b) **Establish a regionally representative, permanent panel of arbitrators;**

(c) **Require the details of a dispute to be published and continuously updated as soon as an investor issues the notice of intent;**

(d) **Ensure that non-parties to disputes have the right to attend arbitration proceedings;**

(e) **Ensure that those who are not party to the dispute, especially affected communities, have a right to make written and oral submissions;**

(f) **Allow arbitration to be conducted in host States to facilitate access to the arbitration by interested parties;**

(g) **Institute a system of review of arbitration awards to reduce arbitrariness.**